



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF :
POLICE OFFICERS, LOCAL 481 :

Complainant :

v. :

LACONIA POLICE COMMISSION :

Respondent :

CASE NO. P-0760:3

DECISION NO. 94-69

APPEARANCES

Representing IBPO Local 481:

Peter C. Phillips, Esq., Counsel

Representing Laconia Police Commission:

Mark Broth, Esq., Counsel

Also appearing:

Jack D. Buckley, Local 481
William Clary, Local 481
Christopher L. Cost, Local 481
Douglas E. Jameson, Local 481
Richard W. Bray, Local 481
Robert D'Amore, Local 481
Daniel McCormack, Local 481
Richard Nasn, Local 481
Robert J. Babineau, Chief of Police
John F. Bieniarz, Laconia Police Commission

BACKGROUND

The International Brotherhood of Police Officers, Local 481 (Union) filed unfair labor practice (ULP) charges against the Laconia Police Commission (Commission) on April 21, 1994 in a five count complaint alleging violations of RSA 273-A:5 I (a), (c) and (e) involving coercive conduct, discrimination because of union activity and refusals to bargain. The Commission filed its answer on June 3, 1994 after which this matter was heard by the undersigned hearing officer on June 14, 1994. Prior to the opening

of the hearing on June 14, 1994 the parties disposed of Counts 2, 3 and 5 as follows. Count 2 was withdrawn without prejudice based upon an understanding that the departmental open door policy would apply to all officers but will not be used for conducting union business or representation matters. Likewise, open door meetings will not be used to circumvent the obligation to deal with the certified bargaining agent on matters of union business. Count 3 was withdrawn without prejudice based upon an understanding that (1) assignment of cruisers will not be made based upon an officer's involvement, or lack thereof, in union activities; (2) Officer Bray, who also happens to be the local president, will not be assigned the "worst" cruiser, identified as car 6, any more frequently than another patrol officer and (3) the use of "sticky memos" versus formal action requests by superiors will be controlled by the nature of the subject matter being addressed, not depending on an officer's union involvement or lack thereof, said policy to be memorialized in a memo from the Chief or Commissioners. Count 5 was withdrawn without prejudice. The case went forward to hearing on remaining counts 1 and 4.

FINDINGS OF FACT

1. The Laconia Police Commission is a "public employer" within the meaning of RSA 273-A:1 X.
2. The International Brotherhood of Police Officers, Local 481, is the duly certified bargaining agent for all sergeants, detective sergeants, corporals, detective corporals, patrol officers and detectives employed by the Commission, having been so certified on May 28, 1993.
3. Richard Bray is a patrol officer employed by the Commission and is president of Local 481.

COUNT 1

4. On January 25, 1994, Bray responded to a call from Lakes Region General Hospital concerning a stolen payroll check in the amount of \$25.63. He commenced an investigation, found the check had been cashed on December 8, 1993 at the Home Bank and, after interviewing the payee, learned that the payee had never picked up the check from the issuing hospital. Payee's endorsement was unclear on the back of the check; however, the name of the cashing party was clear and allowed Bray to identify and contact that individual who then admitted taking the check and depositing it. The individual surrendered to authorities on February 15, 1994.

5. On January 27, 1994, Bray made initial contact with Margaret Miller, manager of Home Bank at 587 Main Street, Laconia. Miller told him it would take several days to check the history of the cashing of the check since it was negotiated in 1993. By February 11, 1994, Bray had learned the identity of and interviewed the teller, Vicki Hanover, who processed the \$25.63 check by depositing it to the cashier's account and remembered particularly that that person had no deposit slips and had asked her to fill out one. Hanover's statement taken on February 11th, but after the approval of the complaint and affidavit, indicates that the transaction occurred at the drive up window. Earlier on February 11, 1994 Bray had filed a complaint and affidavit, both approved by the watch commander, alleging commission of a forgery and obtained an arrest warrant. The complaint alleged that the cashier had negotiated the check at Home Bank, 587 Main St., Laconia. Home Bank's drive up window facility is located at its Gilford office, on Beacon Street East, not at its Laconia Office.
6. When the check cashier surrendered to authorities on February 15, 1994, Bray was not on duty. Detective McCormack handled intake and processing of the check cashier. Even though the arrest reports the forgery occurred at Home Bank on 587 Main Street, Laconia, the check cashier told McCormack that the check had been negotiated in Gilford. McCormack then advised the watch commander, Lt. Timothy Cavanaugh, that the forgery had been committed in another jurisdiction, after which the check cashier was released.
7. On February 15, 1994, Cavanaugh filed an internal affairs investigation complaint charging Bray with unsatisfactory performance, a Class 3 violation. Lt. David J. Landry was assigned as investigating officer. (Joint Ex. No. 1) Landry's investigation was exhaustive, including documentation that Hanover was working at the Gilford office on December 8, 1993, that Hanover's statement, taken by Bray, showed an address of Route 11A in Gilford, and that Bray failed to have statements in a felony case taken under oath. He concluded that the check cashier was improperly arrested, fingerprinted and photographed relative to authority conferred in the Laconia Police Department. On March 8, 1994, he recommended that that internal affairs complaint "be founded" and that Bray have the complaint reduced to a Class 2 violation with a ten day suspension without pay, all but three days of which would be suspended for

three years during which time Bray would not be allowed to take any promotional examinations.

8. Landry's report and recommendations were reviewed by Captain John Bieniarz on March 8, 1994 after which he recommended reduction of the charge to a Class 2 offense. This was approved by Chief Robert Babineau on March 9, 1994. Thereafter a conduct review board met on March 15, 1994 consisting of Cavanaugh, James Carroll and Thomas Detinger. Both Bieniarz and Bray testified. The conduct review board affirmed the penalty of a three day suspension without pay. All other disciplinary measures relative to suspended suspensions and promotional eligibility were eliminated. No appeal was entered, as noted by Babineau on March 17, 1994.
9. Disciplinary suspensions imposed on members of the Laconia Police Dept. from 1989 to 1992 (Employer Ex. #1) for various offenses ranged from a low of four hours suspension for reporting for duty infractions to 10 days of suspension for a truthfulness infraction. An infraction involving processing of property and evidence brought a 2.5 day suspension while another "unsatisfactory performance" infraction in 1992 resulted in a 5 day suspension.

COUNT 4

10. On September 12, 1992, Captain John Bieniarz posted a notice to all sworn officers on the topic of "Temporary Change of Assignment-Detectives." It provided that, "as a way of developing a more well-rounded police officer...we have decided to rotate officers into Detectives on an annual basis, starting January 1, 1993." (Joint Ex. No. 2) This notice solicited letters of interest from officers seeking assignments to detective duties, required that the officers' last evaluation must be "acceptable" or better and provided for review by an oral board. It also reserved the prerogative to initiate a temporary transfer of any officer having specialized training or experience to the Bureau of Criminal Investigations (detectives).
11. Prior to the posting of the September 12, 1992 notice, officers were transferred to detective duties as the result of being hand picked by their superiors. The detective division utilized officers in the ranks of detective, detective corporal and detective sergeant; however, assignments to the division are handled as

matters of transfer, not of promotion. Therefore, since no promotion is involved, no formal order is required to accomplish this transfer.

12. Since the posting of the September 12, 1992 notice, one oral board has been held wherein Detective Moyer scored first and Detective David McCormack scored second. Both had submitted letters of interest and were subsequently assigned to detective duties. Moyer is still so assigned. McCormack was replaced by William Robarge in the spring of 1994.
13. Robarge, a non-union member, has been a member of the drug task force and has expertise in drug enforcement cases. He was intermittently assigned to detective duties as of January, 1994 to reorganize files. On April of 1994 he was assigned to detective duties without submitting a letter of interest or meeting an oral board.
14. William Clary, a six year employee of the department, a corporal for the past 3 1/2 years and also a steward, has applied for assignment to detective duties twice in the last two years, once prior to the February 1, 1993 deadline of the Bieniarz notice and again in December of 1993. Each time he sent in a letter of interest and each time he was told by Bieniarz that these were going to be no detective corporal openings. Conversely, neither time was he told that the letter and oral board requirements of the Bieniarz notice (Joint Ex. No. 2) no longer applied.
15. Bieniarz testified that Robarge was picked for a detective assignment in April of 1994 because of his drug enforcement background and did not contest that this was done without an oral board. He explained that the requirements for transfer to a detective position as listed in his notice of September 12, 1992 were the product of his own expectations and not the result of a general order. As such, they would not necessarily survive a change in operations officers (Captains) such as happened in September of 1993 when Cavanaugh followed Bieniarz in that capacity. Likewise, he said that Clary was not picked for a detective assignment because this would have placed too many corporals in the detective division and would have made Clary unavailable for training officer duties which are typically assigned to corporals.

DECISION AND ORDER

An analysis of the facts surrounding County 1 results in an inescapable conclusion: there was an error in police procedure and the required thoroughness of police investigative work relative to when and how the complaint and affidavit were prepared. Bray's "brain cramp" could have exposed the department to liability, notwithstanding that that did not occur. The facts that statements and evidence came together rapidly and that the check casher confessed when confronted did not excuse the fundamental principle that the Laconia Police Department, and its officers, must act within the bounds of its duly constituted jurisdictional authority. When Bray's police work failed to recognize the extent of that authority, and, in the case of obtaining a warrant, transcended that authority, he was criticized through the commencement of an internal affairs investigation. That investigation recommended that the complaint be founded and that discipline be imposed, as affirmed by the conduct review board. Discipline, somewhat mitigated, was imposed through long established procedures internal to the department. Bray's role as a union activist cannot excuse his inattention to detail or his "unsatisfactory performance" as characterized by departmental documents. There is not evidence that he would have escaped the imposition of discipline but for his union activities. To the contrary, a review of suspension discipline over the past five years (1989-94, in the form of Employer Ex. No. 1) indicates that Bray's discipline was well within the bounds established by the department even before the union was certified.

In International Union, UAW v. Town of Merrimack, Decision No. 94-49 (June 14, 1994) we addressed corrective actions taken against union activists which were not shown to be the product of animus, i.e., would have occurred even without the organizational campaign, and which were not shown to have had a detrimental, coercive or intimidating effect on other unit employees. The complaint was not sustained. Under Appeal of White Mountains Education Association, 125 NH 771 (1984), the Union was required to show some "minimal degree" of anti-union motivation in order to prevail. Here, as there, it did not; therefore, the ULP with respect to Count 1 must be and hereby is DISMISSED.

Count 4 involves the assignment of Robarge to detective duties without any of the preliminary screening steps of the Bieniarz notice of September 12, 1992. (Joint Ex. No. 2) Following the uncontested explanation of Robarge's special expertise and talents with respect to drug investigations, it is not unreasonable to conclude that his assignment falls within the "any officer having specialized training or experience" exception of Joint Ex. No. 2. It is further protected statutorily by RSA 273-A:1 XI which reserves unto management the right to determine its organizational structure (i.e., the lack of need for detective corporals versus the need for experienced training officers, who happen to be

corporals) and the selection, direction and numbers of its personnel. While the unannounced departure from or withdrawal of Joint Ex. No. 2 as an operative notice (a prerogative within Cavanaugh's authority since September of 1993) was less than exceptional management style, under its own terms and under RSA 273-A, this change resulting in the appointment of Robarge does not rise to the level of a ULP. Count 4 must be and hereby is DISMISSED.

So ordered.

Signed this 20th day of July, 1994.



PARKER DENACO
Hearing Officer